

## COVID-19/CORONAVIRUS – EMPLOYER CONCERNS AND QUESTIONS MARCH 25, 2020 UPDATE – UPDATE #8

### THE U.S. DEPARTMENT OF LABOR ISSUES GUIDANCE TO THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March 24, 2020, the United States Department of Labor (DOL) published guidance explaining the paid sick leave and expanded family and medical leave under the Families First Coronavirus Response Act (FFCRA), which was enacted on March 18, 2020. The guidance can be found here: <https://www.dol.gov/newsroom/releases/whd/whd20200324>. Our summary of the FFCRA can be found here: <https://bit.ly/2xpjvMI>.

Notably, **the DOL guidance states that the paid sick leave and expanded family and medical leave requirements of the FFCRA go into effect April 1, 2020, not April 2, 2020**, as many believed.

The DOL guidance provided some clarity on topics relevant to employers who are preparing to implement the FFCRA.

#### **Which Employees are Counted to Determine the 500 Employee Threshold?**

The paid leave and expanded family and medical leave provisions of the FFCRA apply to employers with fewer than 500 employees. In determining whether you have fewer than 500 employees, you should count full-time and part-time employees within the United States, including:

- Employees on leave;
- Temporary employees who are jointly employed by you and another employer, regardless of whether those employees are on your payroll or the other employer's payroll; and
- Day laborers.

Independent contractors are not considered employees for purposes of the 500-employee threshold.

The DOL guidance discusses how to count employees for purposes of the 500 employee requirement where one entity that has an ownership interest in another entity. <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. If you have any questions about how this applies to your business or organization, please contact us.

**How Can Businesses with Fewer than 50 Employees  
Seek to Use the Exemption?**

The FFCRA says that the Department of Labor may issue regulations to exempt employers with fewer than 50 employees from the requirement to provide child care-related paid sick leave and expanded family and medical leave. The guidance issued on March 24, 2020 states that small businesses who want to elect to use this exemption “should document why your business with fewer than 50 employees meets the criteria set forth by the Department.” The guidance indicates that such regulations will be published in April 2020. The guidance further notes that employers should not send any materials to the Department of Labor when seeking to use this exemption.

**Can an Employee Take 80 Hours of Paid Sick Leave for One  
Qualifying Reason and Take Another 80 Hours for a Second Qualifying Reason?**

No. The total number of hours of paid sick leave an employee is entitled to under the FFCRA is 80. An employee cannot “double dip.”

**How Do the Paid Sick Leave and Expanded Family and Medical Leave Interact?**

An employee may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. An employee may take both paid sick leave and expanded family and medical leave to take care of a child whose school or place of child care is closed, or the child care provider is unavailable due to COVID-19 reasons.

According to the DOL guidance, “The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act” unless the employee chooses to use his or her existing leave. “After the first ten workdays have elapsed, you will receive 2/3 of your regular rate of pay for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.”

**Can an Employer Deny Paid Sick Leave Under the FFCRA if the Employer Already  
Gave the Employee Paid Leave for a Reason Covered by the FFCRA?**

No. The paid sick leave provided for in the FFCRA is in addition to any benefits already provided by employers. The FFCRA imposes new obligations on many employers and grants new benefits to many employees.

**Are the Paid Sick Leave and Expanded Family and Medical Leave Requirements  
Retroactive?**

No.

## **Does an Employee Have to Provide an Employer Notice of Leave?**

The DOL notes that “[W]here leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time”.

The DOL guidance also highlights FFCRA provisions related to enforcement:

**Prohibitions:** Employers may not discharge, discipline, or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

**Penalties and Enforcement:** Employers in violation of the first two weeks’ expanded family and medical leave or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. Employers in violation of the provisions providing for up to an additional 10 weeks of expanded family and medical leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the FMLA. The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

### **Helpful Links**

The DOL Fact Sheet for employers can be found here:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

The DOL Fact Sheet for employees can be found here:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

The DOL Questions and Answers can be found here:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

The required posting regarding the FFCRA can be found here:

[https://www.dol.gov/sites/dolgov/files/WHd/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHd/posters/FFCRA_Poster_WH1422_Non-Federal.pdf).

**Our employment team is ready to assist you with any questions you may have about an employer’s obligation arising under the FFCRA, ADA, FMLA, or other laws.**

## GENERAL REMINDERS

The COVID-19/Coronavirus pandemic is fluid. Guidance is changing often as developments occur. We strongly recommend monitoring of credible information sources such as the:

Centers for Disease Control

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Minnesota Department of Health

<https://www.health.state.mn.us/diseases/coronavirus/index.html>

## OTHER EMPLOYMENT GUIDANCE AND CONCERNS

For related guidance and questions about other employment topics related to COVID-19, please see Lind, Jensen, Sullivan, & Peterson's earlier guidance: <http://www.lindjensen.com/category/covid-19/>

## WORKERS' COMPENSATION CONCERNS

For related guidance and questions about workers' compensation concerns related to COVID-19, please see Lind, Jensen, Sullivan & Peterson's separate guidance:

<http://www.lindjensen.com/covid-19-and-workers-compensation-in-minnesota/>

If you have any employment or other questions regarding the ongoing COVID-19 pandemic as it relates to your employees, please do not hesitate to contact our employment team at Lind, Jensen, Sullivan & Peterson by email or phone (612) 333-3637.

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